[filed 10-13-92]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
AT ROANOKE

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. CR 92-90-R
	)	
JAMES F. WOODS;	)	Judge Jackson L. Kiser
JAMES L. GARNER, SR.; and	)	
EDGAR J. DOBBINS,	)	
	)	
Defendants.	)	

MEMORANDUM OF THE UNITED STATES IN RESPONSE
TO MOTION FOR SEVERANCE BY JAMES L. GARNER, SR.

I

INTRODUCTION

Defendant James L. Garner, Sr. ("Defendant") has filed a motion and accompanying memorandum pursuant to Rule 14 of the Federal Rules of Criminal Procedure ("Defendant's Motion") requesting this Court to sever him from the remaining codefendants in the above-captioned case and to grant him a separate trial. For reasons discussed in this Memorandum, Defendant's Motion should be denied.

Defendant essentially offers three reasons in support of his Motion. First, Defendant argues that he should be tried separately because there were three separate conspiracies rather than one conspiracy as charged in the Indictment. Second, Defendant argues that the evidence of his involvement in conspiratorial activity is minor when compared with the evidence against his codefendants. Finally, Defendant argues that the potential "spill-over" effect resulting from a joint trial will

be prejudicial because the jury might find Defendant guilty based upon his "mere association" with the codefendants. Since Defendant's arguments do not satisfy his burden of demonstrating actual prejudice as required under Rule 14, Defendant's Motion should be denied.

II

STATEMENT OF FACTS

As charged in the Indictment and set forth in the Voluntary Bill of Particulars (hereinafter collectively referred to as "the pleadings"), it is clear that Defendant played a significant role in the conspiracy. The defendants are charged with fixing prices and rigging bids in parts of Virginia and West Virginia beginning at least as early as the spring of 1984 and continuing at least until July of 1987. Meadow Gold Dairies, Inc. ("Meadow Gold") had plants in Beckley, West Virginia and Radford, Virginia.

The United States charges that the conspiracy is rooted in an agreement between Defendant Woods and Paul French of Valley Rich Dairy ("Valley Rich") to rig bids in Virginia and West Virginia. Defendant was put in charge of the Meadow Gold's Beckley, West Virginia plant in early 1985 and continued to be in charge of this plant's operations beyond July of 1987. As general manager of the Beckley plant, Defendant had pricing responsibility in that portion of West Virginia that was part of the conspiracy and was a direct participant in the conspiracy. While he was general manager of the Beckley plant, Defendant reported to Defendant Woods, who had been promoted. (In addition

to being Defendant Garner's supervisor, Defendant Woods also was Defendant Dobbins' supervisor after Dobbins was promoted to general manager of Meadow Gold's plant in Radford.)

III

THE APPLICABLE LAW AND LEGAL ARGUMENT

A. Defendant Is Properly Joined And Should Be Tried Together With His Codefendants

Defendant argues that he and his codefendants each should have been charged with a separate conspiracy, rather than all being charged with one conspiracy. Since the pleadings on their face allege one conspiracy, however, Defendant's argument is misplaced.

** Defendant seems to argue that the Indictment should be read as qualified by the Bill of Particulars. Even if the Indictment here is read with the Bill of Particulars, however, there is no basis for Defendant's Motion because nothing in the Bill of Particulars is inconsistent with the charge in the Indictment that there is only one conspiracy.**

At this preliminary stage of the proceedings, the issue of misjoinder raised by Defendant is limited to determining what the Indictment charges as a matter of law. United States v. Berlin, 707 F.Supp. 832, 837 (E.D. Va. 1989). See United States v. Levine, 546 F.2d 658, 663 (5th Cir. 1977). An indictment is proper and the decision as to how many conspiracies existed is for the jury "if the indictment as drawn would permit the government to prove a set of facts that would support a finding

of one conspiracy." United States v. Berlin, 707 F.Supp. at 837. See United States v. Castro, 829 F.2d 1038, 1044-45 (11th Cir. 1987). The Fourth Circuit has held that "[a] single conspiracy exists where there is 'one overall agreement' . . . or 'one general business venture.'" United States v. Leavis, 853 F.2d 215, 218 (4th Cir. 1988) (citations omitted). "Whether there is a single conspiracy or multiple conspiracies depends upon the overlap of key actors, methods, and goals." Id. See United States v. Crockett, 813 F.2d 1310, 1316-17 (4th Cir. 1987).

Examining the face of the Indictment, as required at this stage of the proceedings, Defendant is properly joined with the remaining codefendants under Rule 8(b) of the Federal Rules of Criminal Procedure, which provides for joinder if "[the defendants] are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Fed. R. Crim. P. 8(b). In the instant case, the Indictment charges a single conspiracy involving all three defendants. "[T]he defendants and co-conspirators engaged in a combination and conspiracy to suppress and eliminate competition by fixing prices and rigging bids on milk and other dairy products in western Virginia and southern West Virginia." Indictment, pp. 1-2. In addition, the Indictment charges that the "combination and conspiracy consisted of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators." Indictment, p. 2. Since the pleadings, on their face, allege facts that support a

finding of one conspiracy, Defendant's argument that each of the defendants should have been charged with a separate conspiracy cannot support Defendant's Motion. United States v. Campbell Hardware, 470 F.Supp. 430, 435-36 (D. Mass. 1979).

B. Defendant Has Failed To Demonstrate Actual Prejudice Resulting From His Joinder For Trial

It is hornbook law that absent exceptional circumstances, persons indicted together should be tried together. United States v. Pryba, 900 F.2d 748, 758 (4th Cir. 1990); United States v. Brugman, 655 F.2d 540, 542 (4th Cir. 1981). A presumption in favor of joinder arises when a defendant is charged with a conspiracy. United States v. Steinhorn, 739 F.Supp. 268, 275 (D. Md. 1990). See United States v. Spitler, 800 F.2d 1267, 1271 (4th Cir. 1986). Under Rule 14, the decision to grant or deny severance lies in the first instance within the sound discretion of the trial court and its decision "will not be overturned unless the defendant affirmatively demonstrates a clear abuse of discretion through having been deprived a fair trial and having suffered a miscarriage of justice." United States v. Spitler, 800 F.2d at 1271-72; United States v. Becker, 585 F.2d 703, 706 (4th Cir. 1978), cert. denied, 439 U.S. 1080 (1979). In making its determination, the "trial court must weigh the inconvenience and expense to the government and witnesses of separate trials against the prejudice to the defendants . . . ." United States v. Becker, 585 F.2d at 706.

Moreover, to be entitled to a severance under Rule 14, a defendant must show more than "merely that a separate trial would

offer him a better chance of acquittal." United States v. Spitler, 800 F.2d at 1271 (quoting United States v. Parodi, 703 F.2d 768, 780 (4th Cir. 1983)). Rather, a defendant must show actual prejudice resulting from his being joined for trial with his codefendants. United States v. Clark, 928 F.2d 639, 644 (4th Cir. 1991). The Fourth Circuit has held that "[s]everance will not be granted when the claim is based on the disparity of evidence adduced against individual defendants without a strong showing of prejudice . . . ." United States v. Brugman, 655 F.2d at 543 (quoting United States v. Mandel, 591 F.2d 1347, 1371 (4th Cir. 1979)). Indeed, a defendant seeking severance "must show that a joint trial would have been so prejudicial as to have resulted in a miscarriage of justice." United States v. Pryba, 900 F.2d at 758; United States v. Brugman, 655 F.2d at 543.

Where severance is sought on the ground of conflicting defenses, "it must be demonstrated that the conflict is so prejudicial that the differences are irreconcilable, 'and that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty.'" United States v. Spitler, 800 F.2d at 1272 (quoting United States v. Becker, 585 F.2d at 707, (quoting United States v. Ehrlichman, 546 F.2d 910, 929 (D.C. Cir. 1976), cert. denied, 429 U.S. 1120 (1977))). A trial court's decision denying a severance will not be overturned as an abuse of discretion where a defendant has offered only speculative allegations as to possible prejudice. United States

v. Spitler, 800 F.2d at 1272. Indeed, the Fourth Circuit has stated:

> A district judge is not required to be a mind reader in order to grant or deny a severance motion based on vague and conclusory representations that there might be some conflicting testimony of defendants.

United States v. Spitler, 800 F.2d at 1272.

1. Defendant's Argument That He Will Be Prejudiced Because Of His Disproportionate Involvement In The Charged Conspiracy Ignores Critical Facts And Is Legally Insupportable

Defendant argues that this Court should grant severance because of his claimed "disproportionate involvement" in the charged conspiracy, inasmuch as the number of alleged meetings between himself and French (the former general manager of Valley Rich) is less than the number of alleged meetings between his codefendants and French. Defendant's argument, however, ignores critical facts and is legally insupportable. In reaching his conclusion that he was disproportionately less involved in the conspiracy than his codefendants, Defendant has failed to take into account the qualitative nature of his meetings with French and the scope of his pricing responsibility. See Bill of Particulars pp. 6, 8-10. On their face, the pleadings clearly charge that Defendant played a significant role in the continuance of the conspiracy from the time he was put in charge of the Beckley, West Virginia plant in early 1985 at least through July of 1987.

Moreover, the Fourth Circuit has expressly rejected the argument that a disparity in evidence among codefendants, absent

a compelling showing of actual prejudice, justifies severance. For example, in United States v. Brugman, 655 F.2d at 543, the Fourth Circuit held that the trial court did not abuse its discretion in denying severance where two defendants were charged with three and four counts, respectively, and their codefendant was charged with 18 counts. See United States v. Mandel, 591 F.2d at 1371; United States v. Hargrove, 647 F.2d 411, 415 (4th Cir. 1981). In the instant case, Defendant has made no showing of actual prejudice. Accordingly, Defendant's argument that joinder will be prejudicial to him because of his "disproportionate involvement" in the charged conspiracy is legally insupportable and serves as no basis for severance under Rule 14.

2. Defendant Has Failed To Demonstrate Prejudicial "Spill-Over" Effects That May Result From Joinder

In the instant case, Defendant argues that this Court should grant severance because he may be prejudiced by the potential "spill-over" effects resulting from joinder. Defendant argues that "there is great potential for the jury to use the evidence of the duplicity of the alleged acts of [Defendant] Woods and [Defendant] Dobbins to infer criminal disposition on the part of [Defendant Garner]; to cumulate the evidence of the various crimes charged; and to find guilt on the part of [Defendant Garner] when, if the cases were considered separately, it would not do so." Motion For Severance By James L. Garner, Sr., ¶ 5.

Defendant's unsubstantiated speculation as to possible "spill-over" effects cannot support his Motion. Defendant has

failed to show that any potential, "spill-over" effects resulting from joinder cannot be adequately protected by limiting instructions cautioning the jury to keep separate the evidence against each defendant. See, e.g., United States v. Smith, 918 F.2d 1551, 1559-60 (11th Cir. 1990) (and cases cited therein). Indeed, Defendant shows no appreciation for the jurors' ability to properly fulfill their role in the administration of justice.

3. Defendant Has Failed To Demonstrate That Actual Prejudice Will Result From The Potentially Conflicting Defenses Of His Codefendants

Defendant argues in a conclusory fashion that "[t]he inclusion of the counts against [Defendant Garner] will undoubtedly be confounded by the presentment of the separate defenses of his co-defendants." Motion For Severance By James L. Garner, Sr., ¶ 5. In making this argument, however, Defendant has made no attempt to explain the nature of his defense or in what respect his defense is irreconcilable with those of his codefendants. Indeed, Defendant has failed to offer any basis supporting his argument that he will be prejudiced as the result of the "separate defenses of his co-defendants." Id. Accordingly, there is no basis to grant Defendant's motion "[w]here, as here, [Defendant] fails to state the nature of his defense and in what respect, if any, his defense is irreconcilable with that of his co-defendant[s]." United States v. Spitler, 800 F.2d at 1272.

III

CONCLUSION

In short, Defendant has failed to substantiate that any prejudice exists, no less the degree of prejudice necessary to warrant severance under Rule 14. Moreover, judicial economy and the inconvenience and expense to the United States and witnesses of separate trials clearly outweigh the speculative allegations of prejudice advanced by Defendant. Therefore, the United States respectfully submits that Defendant's motion should be denied.

Respectfully submitted,

"/s."

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